

DEPARTMENT OF DEFENSE BLOGGERS ROUNDTABLE WITH BRIGADIER GENERAL THOMAS HARTMANN, LEGAL ADVISOR TO THE CONVENING AUTHORITY IN THE DOD OFFICE OF MILITARY COMMISSIONS VIA TELECONFERENCE TIME: 3:47 P.M. EST DATE: MONDAY, FEBRUARY 11, 2008

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GEN. HARTMANN: Good afternoon. I will just advise you that earlier this day, the convening authority received sworn charges against six individuals allegedly responsible for the planning and execution of the attacks that occurred on September 11th in the United States. Those attacks resulted in the death of 2,973 people, including eight children.

The charge sheet that we received earlier in the day alleges that that is the result of a long-term, highly sophisticated and organized plan by al Qaeda to attack the United States. The charge sheet is posted on defenselink.com -- dot-mil, I'm sorry. But the accused are Khalid Sheikh Mohammed, Walid Bin 'Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, Mustafa Ahmed al Hawsawi, and Mohammed al Kahtani.

The procedure that will be provided in these cases is that the convening authority will now review them to determine if they should be referred in any way to a trial by military commission. The chief prosecutor has requested that the charges be tried jointly for all six of them and that they be referred as capital for each of the defendants.

The charges are conspiracy and then the substantive offenses of murder in violation of the law of war, attacking civilians, attacking civilian objects, intentionally causing serious bodily injury, destruction of property in violation of the law of war, terrorism, and providing material support to terrorism. And then the first four people that I named -- Khalid Sheikh Mohammed, Walid Bin 'Attash, Ramzi Binalshibh, and Ali Abdul Aziz Ali -- are charged with the substantive offense of hijacking or hazarding a vessel.

The conspiracy charge alleges 169 overt acts, and each one of the accused is named within those acts. The convening authority has no time limit on the period of time she has to consider the matter and take my legal advice under consideration, but after she makes a determination, and should she refer any of the cases to trial, then 30 days until arraignment, which is the time when the accused is read the charges formally in court and has an opportunity to plead, and 120 days from referral before the court is assembled. In the middle of those two would be discovery and motions. So it's possible that those timelines -- the 30-day timeline will be fixed; the 120-day timeline may push out.

The judge's discretion applies as to whether they are referred as death penalty cases as well as to whether they're referred jointly and to whether they're referred at all, any or all of them.

So that's a matter in her sole discretion.

I think it's important, very important, that we understand the rights that are available to these people, these accused, because these rights exceed the rights that were available at Nuremberg and the rights that are available at most -- at the other international criminal tribunals.

And I'd like to list those rights for you: the right to remain silent and have no adverse influence drawn from it; the right to be represented by detailed military counsel and civilian counsel of their own selection at no expense to the government; the right to examine all evidence used against them by the prosecution; the right to obtain evidence and to call witnesses on their own behalf, including expert witnesses; the right to cross-examine every witness called by the prosecution; the right to be present during the presentation of evidence; the right to have a military commission panel of at least five members determine guilt by a two-thirds majority, or in the case of a capital offense, a unanimous decision by a jury composed of at least 12 members; and three layers of the right to appeal -- the right to appeal to the Court of Military Commission Review, the D.C. Circuit Court of Appeals and the United States Supreme Court.

Sandwiched on either end of those rights are Judge Crawford's review. Judge Crawford, as I mentioned in the beginning, will review it for a referral consideration. And she will review it before they even get to the appellate stage. After a finding of guilt and a sentence, she will review it to determine if the sentence should be reduced or if a charge should be dismissed.

Note that she cannot add a charge or increase a sentence, only reduce it. So that's an amazing benefit for the accused in these cases, and it's our view that these match very closely the rights that we make available to our soldiers, sailors, airmen and Marines in the court-martial practice. And it's a process and a practice that we use pretty regularly in the military, in fact, thousands of times a year across the services, and we're very proud of it in the military. It's been praised quite regularly across -- by civilian defense counsel about the rights that are given to military people, their military defendants, and we think that those similar rights are available here.

So I'm happy to answer any of your questions, but I do remind you that the accused, in this case, are subject only to allegations and that they are and will remain innocent unless they are proven guilty beyond a reasonable doubt. CHARLES "JACK" HOLT (chief, New Media Operations, OASD PA): All right, sir.

And Chuck, you were first on line. Why don't you get us started?

Q Yes. General, thank you for meeting with us.

I'm with America's North Shore Journal.

GEN. HARTMANN: Chuck.

Q A clarification first. The headlines are indicating that -- are phrased in such a way that it would appear to the casual reader that the

defendants are going to be -- are going to be facing the death penalty. Now, as I read your materials, that is still to be determined.

GEN. HARTMANN: That's correct, Chuck. The convening authority will decide what gets referred to trial.

Q Okay. And whether or not it will be a capital offense?

GEN. HARTMANN: Correct.

Q Okay.

My question, then, is in regard to a capital offense. Have the means and method been determined should a conviction be upheld for a capital offense?

GEN. HARTMANN: Chuck, our focus is in a different direction. Our focus is on making sure that the trials are fair, open, legitimate and transparent. And therefore our focus is on, first of all, getting it through the referral process.

Should Judge Crawford make a determination to refer any or all of these as capital, then the focus will shift into the courtroom. A jury of at least 12 members must be assembled on a capital case and they must unanimously agree to the death penalty. Then they must unanimously agree on the aggravating factors that the prosecution puts forward, and then they must unanimously agree on a sentence. Only then do you even get the case out of trial, back to Judge Crawford for a review that I discussed before. And then the accused has three levels of potential appeal.

So our focus is on the trial process, not on any potential methods or locations or details associated with the procedure for carrying out a death penalty. That will be determined at the appropriate time, consistent with the law as it exists at that time, Chuck. Q All right. Thank you.

MR. HOLT: Okay, Charlie Quidnunc.

Q Yes, General, this is Charlie Quidnunc at Wizbang.

My question deals with how secret this tribunal is going to be. Is there a concern about state secrets getting out -- sources and methods of the CIA, for example -- getting out at the trial? Is it going to be a secret trial or are people going to see what's going on and see the evidence? How's their security?

GEN. HARTMANN: Charlie, that's a good question. There are no secret trials in this process. Every piece of evidence that goes to the jury will be subject to confrontation, cross-examine, review, challenge by the accused and his defense counsel in the presence of the judge.

There may be limited circumstances -- I'm advised that it will be in relatively limited cases -- that the prosecution will present, will even bring up classified evidence.

And there are appropriate protections in place -- through the rules of evidence, the rules of procedure and the processes for dealing with classified -- to ensure that the classified is protected. Some of those ways are stipulations of expected testimony, stipulations of fact, masking the document.

All those things are in place as ways to protect the national security interest, to the extent that it's involved in any of the documentation.

Thanks for that question, Charlie.

MR. HOLT: And Bryant Jordan.

Q Hi. Thank you very much, General.

I'm wondering if -- how this move toward the trial is going to be affected, the case against one or any of these men, will be affected by the fact that, I guess, only last week, General Hayden acknowledged that Khalid Sheikh Mohammed was at least one of three people who were tortured.

GEN. HARTMANN: That's a good, that's an important question, and the answer is that those kinds of allegations will be dealt with in the courtroom. The trial counsel are responsible for presenting the evidence. They understand the legal burdens of any evidence they need to present, and I expect them to achieve that. In whatever way they need to achieve that, that's their legal burden, their legal obligation. And it's in their discretion on how to proceed.

I do emphasize however that the United States is a nation of laws and not of men. And so these -- questions like you've asked, which are good ones, are best decided and really only decided at this point in the courtroom. There's been no specific legislation on the exact forms of any particular interrogation technique that fit any definition.

So it will be resolved by military judges who have decades of experience in dealing with matters of law and fact. And if any of those of you who are lawyers or have followed trials regularly, you understand that the purpose of a trial is to gather facts. 90 percent of what occurs in a trial is fact. So let's let the facts play out in the courtroom. Let the prosecution present whatever they need to present; let the defense vigorously challenge it, as is their obligation.

And they've done that in the past and I expect them to do that in the future. That's their responsibility. And then let the judge make the decision. That's the rule of law and that's the practice we're going to follow.

MR. HOLT: Okay, Steve Schippert.

Q Good afternoon, General. Steve Schippert with ThreatsWatch.org.

First, I think it's important to clarify for the record that the United States government does not view waterboarding as torture per se.

I also have a question, again, about the nature of classified evidence -- a two part question on that, sir. The evidence -- has any evidence specifically been declassified in order to be presented at trial? And the second part of the question regarding classified evidence, you mentioned procedures, about protecting that evidence. Will that -- will classified evidence, as part of the procedures, still allowing the defense to see classified evidence?

GEN. HARTMANN: Steve, as to your first question, yes, the team's worked for a number of years to try to declassify evidence for the -- not specifically for this trial, but they've gone through the process of reviewing

the classification and determining if the -- if the particular material in question could be declassified. So that process was undertaken for a number of years and is still ongoing.

Q Okay.

GEN. HARTMANN: With regard to protecting the classified, the defense counsel will have -- the military defense counsel will have the appropriate security clearances to be able to review classified evidence and -- yeah, so yes, the defense counsel will be able to review classified evidence. It may not always be the case that their client can review it, but again, anything that goes to the finder of fact that determines guilt or innocence, that affects the liberty of these people, they will have the opportunity to review. So if something goes to the finder of fact that is classified, the accused will be able to see that.

Q Are there any differences in the procedures once an appeal hits the U.S. civilian courts, the circuit courts or the Supreme Court? GEN. HARTMANN: No, the only difference is that we have the Court of Military Commission review before you get to those civilian courts. And that's the only difference. That's an additional right that -- another right that doesn't exist normally because they get an automatic right of appeal on a finding of guilty, and that doesn't exist anywhere else. But if you're asking about classified, the classified would also be protected at those other court levels, and they have -- they have facilities to deal with classified evidence.

Q Okay, thank you, sir.

GEN. HARTMANN: Okay. And Bobby Chesney?

Q General Hartmann, this is Bobby Chesney at Wake Forest and the National Security Advisers blog. Thank you for doing this today.

A quick question. It's been reported in some sources today that -- and I would think this sounds premature that people are saying this, but they're saying that it's unlikely that at trial, prosecutors will be using statements obtained with respect to these detainees insofar as they were held in CIA or other government agency custody. Perhaps you're not in a position to comment on this now or even at a later point, but if you are, is it the case that we should not expect to see statements from these particular detainees used against them at trial? And do you have any other light you can shed on that issue?

GEN. HARTMANN: Bobby, let's not prejudge the case. Let's allow the case to unfold in the courtroom where it's an open and transparent process to the extent that it can possibly be.

So I can't prejudge what the prosecutors will use as evidence to try to present their case or what the defense will use as evidence to try to present --

Q Fair enough.

MR. HOLT: Okay. And Richard Lowry.

Q Good afternoon, General. I have a question on timing. These men have been in custody for years. Why now are they being indicted? Why weren't they indicted a year ago or why not next year?

GEN. HARTMANN: Well, they're begin indicted now, Richard, because the evidence has been reviewed by the intelligence community, law enforcement community and the legal community and they have presented sworn charges to the Convening Authority indicating that they believe they have enough evidence to proceed to trial. The global war on terror has been ongoing for some time and continues today. It's been fought in mountain caves in Tora Bora to skyscrapers in the United States, crowded marketplaces, parking lots, in trains and subways, in planes. It's been fought through dummy corporations, through forged passports, falsified currencies, and it has impacted -- there are public sources that say that the injured and the dead in the 9/11 attacks came from over 90 countries across every race, religion, sex and national origin. So it's taken a while to gather the information about these cases and bring them to trial, and here we are.

As to the people who are detainees, that's a separate matter that is dealt with outside the military commissions, and those people are held because they're alien, unlawful enemy combatants who pose a danger to our soldiers, sailors, airmen and Marines on the battlefield. And it's traditional international law that they can be held until the end of hostilities.

Q So you're just now getting to the point where you think you have enough evidence that you can use to convict these men?

GEN. HARTMANN: Well, that's what's been presented to me. That's -- the prosecution's been working on it diligently. Quite an outstanding team of Department of Justice and DOD team has been working on that pretty aggressively for the last 18 months when these high-value detainees were brought to Guantanamo. Q Thank you.

MR. HOLT: Okay, just a couple of minutes left. Any follow-up questions?

Q This is Chuck. I have one.

In essence, this is the process that David Hicks went through, then. Am I correct?

GEN. HARTMANN: Yes, Chuck. He was in the military commission process.

Q Okay.

Now, is there any potential for another government to request extradition of any of these people? For example, the current Afghani government could have a potential cause. Are we going to be involved with extradition proceedings as well?

GEN. HARTMANN: Well, Chuck, they can seek the extradition. And it would be in the determination of the Department of Defense and the -- I'm not sure who makes that decision. It's certainly not my decision as to whether somebody leaves Guantanamo Bay or is extradited.

MR. HOLT: Okay, all right.

General Hartmann, thank you very much for being with us this afternoon, and we appreciate you taking the time to spend with us here on the Bloggers Roundtable.

GEN. HARTMANN: Thank you very much for the questions and for the opportunity.

MR. HOLT. You bet, sir. Thank you very much.

END.